IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

APPEAL NO. 465 OF 2004
IN
NOTICE OF MOTION NO.993 OF 2004
IN
ADMIRALTY SUIT NO.51 OF 1998

Shri Sadhu Singh .. Appellant

v/s.

1. East Fleet Maritime Pvt.Ltd.
& ors. .. Respondents

Mr. K.H.Mody with Ms. Nisha Singh i/by M/s. Vyas & Bhalwal for appellant.

Mr. Girish Desai with Mr. Bootwala for respondent Nos.2 and 3.

CORAM : R.M.LODHA AND
J.P.DEVADHAR, JJ.

DATED : 5th August, 2004

P.C.

Heard.

2. The appeal is admitted.

3. The advocate on record for respondent Nos.2 and 3 waives service. Service on respondent Nos.1 and 4 is dispensed with being not necessary for the purposes of this appeal.

4. Paper-book dispensed with.

5. By consent, the appeal is taken on board for hearing and final disposal.

6. The plaintiff is in appeal before us being aggrieved by the order dated 22.4.2004 passed by the learned motion Judge refusing to take on record additional affidavit in the form of examination-in-chief.

7. It is not necessary to record the facts at length. Suffice it to observe that on 22nd March, 2003, the affidavit in the form of examination-in-chief of the plaintiff was tendered in the court. The cross-examination was ordered to take place before the Commissioner. It appears that there was some confusion about the contents of the list of documents and that the advocate for the plaintiff also intended to file further affidavit by way of examination-in-chief and accordingly, the Commissioner adjourned the matter to 13th December, 2003. On 13th December, 2003 on behalf of the plaintiff an additional affidavit in the form of further examination-in-chief was handed in to the Commissioner but upon objection by the contesting defendant Nos.2 and 3, the same was not taken on record but marked 'X' and the Commissioner proceeded with the cross-examination of the plaintiff. The plaintiff then took out notice of motion for taking on record the additional affidavit submitted on 13.12.2003 before the Commissioner by way of further examination-in-chief. The learned motion Judge

rejected the notice of motion by observing that the deponent having already been cross-examined, the question of permitting additional affidavit by way of further examination-in-chief does not arise.

8. Order 18 Rule 4 of the Code of Civil Procedure reads thus-

> "[4. Recording of evidence.-(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:
>
> Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.
>
> (2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it:
>
> Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit:
>
> (3) The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.
>
> (4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination:
>
> Provided that any objection raised

during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

(8) The provisions of rules 16, 16A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commission under this rule.]"

9. It appears from the perusal of sub-rule (2) of Rule 4 of Order 18 that the cross-examination and re-examination of the witness is taken either by the court or by the Commissioner whose evidence (examination-in-chief) has been furnished to the court. Strictly speaking, in that view of the matter, the Commissioner could not have considered the additional affidavit tendered before him as further examination-in-chief as it was not furnished in the court. But for this irregularity, the plaintiff could not have been punished from leading further evidence (examination-in-chief) and the inconvenience caused to the contesting defendants could have been compensated in terms of money. If the cross-examination was to be conducted by the court then perhaps the problem

would not have arisen since on 13.12.2003 before the cross-examination of the witness began, the additional affidavit by way of further examination-in-chief of the plaintiff was already tendered and the court would have passed an appropriate order. However, this could not be done because the cross-examination was to be conducted before the Commissioner appointed by the court and strictly speaking, the Commissioner could not have taken on record the additional affidavit filed by way of examination-in-chief when it was not furnished to the court. Taking overall facts and circumstances of the case, we are satisfied that the interest of justice shall be subserved if the additional affidavit of the plaintiff furnished by way of further examination-in-chief is taken on record and the witness is permitted to be cross-examined further, if necessary, subject to reasonable cost being imposed on the plaintiff. After all, the procedure is hand-maid of justice and not its mistress.

10. We accordingly, dispose of this appeal by the following order:-

(i) The order dated 22.3.2004 is set aside subject to plaintiff -appellant's paying a cost of Rs.15,000/- to defendant Nos.2 and 3 collectively.

(ii) The additional affidavit of the plaintiff handed in to the Commissioner on 13.12.2003 (marked 'X') is taken on record as further examination-in-chief of the plaintiff.

(iii) The defendant Nos.2 and 3 shall have right to cross-examine the plaintiff further.

(iv) Further time of three months is given to the Commissioner for completing the recording of the evidence.

(R.M.LODHA, J.)

(J.P. DEVADHAR, J.)